U. OF F. LIBRARIES

343.75907
F636e
c. 2

UNIVERSITY
OF FLORIDA
LIBRARIES

ENERGY
LAW IN
FLORIDA

U. OF F. LIBRARIES

MAY 1975 —— FLORIDA ENERGY COMMITTEE

Digitized by the Internet Archive
in 2011 with funding from
University of Florida, George A. Smathers Libraries with support from LYRASIS and the Sloan Foundation

http://www.archive.org/details/energylawinflori00flor

ENERGY LAW IN FLORIDA

Prepared by

FLORIDA ENERGY COMMITTEE

of the
State of Florida

226 West Pensacola Street
Suite 300
Tallahassee, Florida 32304

CO-CHAIRMEN
Senator George Firestone
Representative J. Hyatt Brown

EXECUTIVE DIRECTOR
Marvin Yarosh

May 1975

University of Florida 1853

343.75907
F636e
c. 2

This public document was promulgated at a cost of $5,700.63 or $7.13 per copy to provide information to the executive and legislative branches of state government and to other interested persons on the studies and recommendations developed by the Florida Energy Committee. The cost of preparation by Committee members and staff, as well as printing and distribution costs, was financed from a $200,000 appropriation by the 1974 Legislature.

Foreword

In the language of the enabling legislation establishing the Florida Energy Committee (FEC), the Committee was directed to examine in detail present state policies which affect energy conservation and use in Florida. Soon after its formation, the FEC made the decision to develop detailed data on the sources of energy for Florida and the patterns of energy consumption in Florida. A summary of the information obtained on those topics was recently published by the Committee in a volume entitled *Florida's Energy Profile*. Concurrent with the effort to gather specific data on energy sources and consumption, an investigation was initiated to identify the primary laws, statutes, rules, and regulations which constitute what can be called "energy law" in Florida. This report presents the results of the latter effort.

While the examination of energy law in Florida was conducted by the FEC staff, a simultaneous study was undertaken at the University of Florida to examine the jurisdictional authority of state and federal governments, respectively, as related to energy policy. The University of Florida report on this subject has already been issued by the Committee; when read in conjunction with the present report, a comprehensive picture emerges outlining not only energy law in Florida but also the state-federal relationship in the distribution of the power to create energy policy.

Florida's de facto energy policy is in truth a synthesis of many chapters of the statutes (or individual sections within chapters) that regulate, control, or otherwise influence the various aspects of energy production, conversion, transportation or transmission, and use. This report presents the most comprehensive compilation available of the specific ways in which Florida law impacts on the energy field—an impact transmitted through safety codes, tax measures, building codes, pricing regulations, and a variety of other ways.

The major portion of this project was performed under the supervision of Marvin L. Rudnick, an attorney formerly on the Florida Energy Committee staff. The bulk of the written material was prepared by Michael P. Basile, a senior law student at The Florida State University; contributions to specific sections were provided by Vanda Bayliss and Anthony Pires, also law students at FSU. The Introduction was prepared by Dr. Henry F. Romer, and E. Douglas Spangler, an FSU College of Law graduate on the FEC staff, performed a thorough review of the report for legal and technical accuracy. Susan Ioe was responsible for editing and final production.

We believe that this volume, together with the other reports issued by the Florida Energy Committee, will contribute to an understanding by policy makers of the complex nature of energy law and will enable them to discern how their decisions can and will impact on energy activities within the state.

MARVIN YAROSH
Executive Director

TABLE OF CONTENTS

Page
INTRODUCTION 1

CHAPTER ONE

EXPLORATION AND PRODUCTION OF ENERGY RESOURCES

I. INTRODUCTION 3
II. OIL AND NATURAL GAS EXPLORATION AND PRODUCTION 3
  Acquisition of Property Interest 3
    State-Owned Lands 3
    Privately Owned Lands 4
  Actual Explorative and Productive Activities 4
    Permits 4
    Sanctions for Non-Conformance 5
    Taxation 6
III. URANIUM ORE EXPLORATION AND PRODUCTION 6
  Acquisition of Property Interest 6
  Actual Explorative and Productive Activities 6
    Permits 6
    Taxation 6

CHAPTER TWO

ENERGY PROCESSING

I. INTRODUCTION 9
II. WATER QUALITY REGULATION 9
  Federal Controls 9
  State Controls 10
III. AIR QUALITY REGULATION 11
  Federal Controls 11
  State Controls 12
    Powers and Duties of the DPC 12
    Non-Degradation 13
    Air Pollution Episodes 13
IV. LAND USE REGULATION 14
  Acquisition 14
    Restrictions 15
    Areas of Critical State Concern 15
    Developments of Regional Impact 16

CHAPTER THREE

TRANSPORTATION OF ENERGY

Page
I. INTRODUCTION 19
II. NATURAL GAS 19
  Safety 19
  Eminent Domain 19
III. PETROLEUM AND PETROLEUM PRODUCTS 19
  Safety and Environmental Regulations 19
    Water Transport 19
    Land Transport 20
  Eminent Domain 20
  Other Regulation 20
IV. NUCLEAR FUELS 20
  Interstate Transport 20
  Intrastate Transport 21

CHAPTER FOUR

ELECTRICITY

I. INTRODUCTION 23
II. GENERATION 23
  Environmental Controls 23
  Siting 23
III. TRANSMISSION 24
IV. SALES 24
  Investor-Owned Utilities 25
  Rural Electric Cooperatives 25
  Municipal Electric Utilities 26
    Constitutional Limitations 26
    State Pre-Emption 26

CHAPTER FIVE

ENERGY USE

I. INTRODUCTION 29
II. CONSUMER PROTECTION 29
  Quality Control 29
  Sales and Rate Regulation 29
III. PUBLIC SAFETY AND WELFARE 30
IV. TAXATION 31
  Municipal Tax 31
  Utilities Tax 31
  Taxation of Motor Fuels 31
  Sales Tax 32
  Registration Taxes 32
V. PLANNING AND DEVELOPMENT 33

CHAPTER SIX

RECENT DIRECT RESPONSE TO ENERGY PROBLEMS

Page
I. INTRODUCTION 35
II. CREATION OF FEC 35
III. ENERGY DATA CENTER 35
IV. SOLAR ENERGY CENTER 36
V. ENERGY LIFE-CYCLE COST ANALYSIS 36
VI. OFFICE OF PETROLEUM ALLOCATION AND CONSERVATION 36

CONCLUSION 39

INTRODUCTION

Parallel to the increased use of energy in our modern society has been the increased body of law which impacts, regulates, and controls societal activity relating to energy. In Florida, as in other states, some powers granted to state government have been exercised over the years to directly influence energy (as in electricity regulation) but more often to accomplish other objectives which peripherally influence energy flow. Law dealing both broadly and specifically with all forms of energy is relatively rare and in most instances new.

Energy law—as considered in this report—includes all these areas and consists of those sections of Florida statutory and case law and agency rulings which bear on the flow of energy in the state. Though much of this law is not new, the present need for close examination of energy supply and use in Florida has necessitated this compilation. In addressing Florida's energy problems, it is important to view the entirety of present law both to insure the compatibility of new legislation and to clearly identify areas where revision is warranted by changing circumstances.

Such a survey has another important function. It serves to outline the general nature of the state's de facto energy policy: the implied directions and philosophy contained in the existing body of energy law. Thus, in the consideration and creation of an explicit state energy policy, continuity can be maintained when appropriate, and departures can be made when the evidence supports new directions for state government.

It is important to emphasize that the innovation in this compilation is not legal but rather largely organizational. What is being presented is a new way of looking at what for many should be a familiar body of law. The methodology employed for compiling this law relates it more clearly to the physical flow of energy and hence allows individuals concerned with that flow, but less familiar with Florida law, to understand its impact. At the same time, those who deal routinely with segments of present energy law will be able through this organization to see how those segments relate to the total picture.

The compilation begins with the subject of the exploration and production of energy resources. Florida, with a thirty-two-year history of oil production and a much longer period of exploration, developed considerable law relating to land acquisition and production control. Recently, uranium extraction as a by-product of phosphate production has been considered for commercial application, and laws relevant to this activity are also discussed.

In most instances, energy as produced in its raw form is unsuitable for consumer use. Energy processing is one of a number of activities on which law can and does bear. In the discussion on processing, the areas of environmental regulation to preserve air and water quality and influence land use as it affects individual development and use are described.

An important intermediate activity in Florida is the transportation of energy. Florida, as an importer of 98 percent of the energy it consumes, depends heavily on energy moving into the state from outside its borders. Movement of petroleum products and natural gas within the state from points of entry to final consumers is also important. Again, the recent need to consider the advent of nuclear power has enlarged the body of energy law as it relates to the movement of nuclear fuels in Florida.

The high degree of reliance on electricity as a processed energy product and the complex nature of electricity generation, transmission, and sale make it necessary to devote a section to the law applicable to this area. The regulation of electricity service as a public utility, although accomplished through a variety of approaches, is outlined as are the laws governing the overall process of electricity planning.

The law which affects the consumer's use of energy is divided into four areas: (1) consumer protection, (2) public safety and welfare, (3) taxation, and (4) planning and development.

Those laws and regulations with whose impact the Florida energy consumer is likely to be familiar and those less well-known laws are summarized. Quality control programs for petroleum products, fire safety laws, and the state gasoline and special fuel taxes and their distribution are among the items examined.

Finally, recent law which was created largely in direct response to widespread energy problems is outlined. Petroleum allocation as well as the creation of the Florida Energy Committee and energy laws enacted during the 1974 legislative session are covered.

Even with the method of organization employed here, there exist overlapping areas of law. This may only reflect the complexity of both the law and energy in general. Compilation of Florida's energy law according to its relationship to physical energy flow, however, provides an overview of the entire legal picture in addition to simplifying the process of locating the body of law impinging on any one part of the process.

Chapter One

EXPLORATION AND PRODUCTION OF ENERGY RESOURCES

I. INTRODUCTION

State law regulating the exploration and production of Florida's natural energy sources treats the subject according to its two major phases: (1) acquisition of property interest and (2) actual exploratory and productive activity. An interested party must first obtain a legal interest in the land on which the exploration or production is intended to occur. This accomplished, the activity must be conducted in the manner prescribed by statute and by regulations adopted pursuant to statutory requirement. The extent of state control over phase one is determined by property ownership—*i.e.*, whether by the state or by private concern. The second phase is uniformly controlled, regardless of the nature of original ownership.

The chapter below will examine these phases by energy resource type (oil and natural gas, then uranium); coal and hydroelectricity are not included because of their unavailability as natural resources in Florida.

II. OIL AND NATURAL GAS EXPLORATION AND PRODUCTION

Acquisition of Property Interest

State-Owned Lands

The Board of Trustees of the Internal Improvement Trust Fund (subsequently referred to as the Trustees) is vested with the title to the sovereign lands of the state.[1] Among other duties consistent with this vestiture, the Trustees are authorized to market leases for oil and natural gas exploration and production;[2] this authority is limited by various criteria and prohibitions expressed in Chapter 253 of the Florida Statutes, as well as in other statutes relating to oil and gas. Leases granted by the Trustees are of two types, based upon a legal distinction between land which is considered "wet," or bottom land, and land which is "dry," or dry land.

Bottom Lands. The Trustees are authorized to lease the rights for exploration and production of oil and natural gas on the bottoms of bays, lagoons, straits, sounds, gulf, streams, and lakes owned by the state in its sovereign capacity.[3] This general grant, however, is limited in practice by the existence of other statutes, one of which prohibits the construction of operating structures on fresh-water lakes, streams, and rivers.[4] The standard lease instrument used by the Trustees reflects this conflict and recognizes the supersession of this as well as other prohibitive statutes to be identified below.

Another limitation is placed on the general leasing power of the Trustees by the requirement of deference to local authorities. No lease for exploration or production of oil or natural gas may be granted on tidal lands which abut, adjoin, or remain within three miles seaward of the corporate boundaries of a municipality without a "resolution of consent" from the affected municipality.[5] Similarly, if the subject bottom lands lie within the above proximity of an "improved beach"[6] outside the boundaries of a municipality, a "resolution of consent" must be obtained from the appropriate board of county commissioners. This "three-mile" criterion contained in the statute delineating the Trustees' authority is further effectively modified by another statute which absolutely prohibits construction of operating structures within one mile of the coastline.[7] Once again the lease instrument recognizes this conflict.[8]

Dry Lands. Subject to limitations, the Trustees have the authority to lease the rights for exploration and production of oil and natural gas on lands other than bottom lands but still within their lawful control.[9] The statute authorizing the Trustees' regulatory power over these lands echoes the deference-to-local-authority restriction placed upon bottom land leases: should the lands subject to the lease lie within the corporate limits of a municipality, no lease may be granted until a "resolution of consent" has been passed by that municipality.[10] This veto power does not, however, extend to counties in that no provision has been found for a county's approval of leases on unincorporated (nonmunicipal) lands within its borders.

Conflicts. As indicated above, the general grant of leasing authority to the Trustees is subject to both internal and external limitation. In the event of a conflict between the general grant of authority to lease and other conservation or control laws, the latter will prevail.[11]

Leasing Mechanics. Whenever in the opinion of the Trustees a demand exists for the purchase of oil and natural gas leases, they must place such leases on the market.[12] Notice must be given[13] and hearings held in the appropriate locations where applicable consent from municipalities is required. Bidding is sealed[14] and competitive;[15] upon opening of the bids, the award goes to the "highest and best" bidder providing, however, that the board has the discretion to reject all bids.[16] Where bids are awarded, the State may receive in excess of the minimum one-eighth "in kind" royalty. The terms of the leases may not exceed ten years[17] but provide for termination at an earlier date if the Trustees find the lessee is not operating the lease in a "workmanlike and diligent manner" (as defined by statute).[18]

Privately Owned Lands

The sale or lease of the right to explore and produce oil and natural gas on privately owned lands is governed by private contractual agreement and therefore does not fall under the authority of the Trustees.

ACTUAL EXPLORATIVE AND PRODUCTIVE ACTIVITIES

Upon obtaining oil or natural gas rights—from whatever source—the interested party comes within jurisdiction of the Division of Interior Resources (hereafter termed the Division) of the Department of Natural Resources (DNR).[19] The method of control provided for the Division by law consists of a comprehensive report-and-permit structure. In addition to this authority, the law provides sanctions for noncompliance and taxation of operation.

Permits

Permits and/or detailed reports are required for every phase of oil and natural gas operations from initial explorative drilling to the final abandonment of the wellhole.[20] Three general criteria are considered by the Division before granting a permit: (1) the nature, character, and location of the *lands* involved; (2) the nature, type, and extent of the applicant's *ownership*; and (3) the proven or indicated *likelihood of the presence of oil or natural gas* in quantities to warrant exploration and extraction of the product.

These general considerations are supplemented by more specific criteria applicable to the various permits required by statutes. Initial geophysical testing and other exploratory operations prior to the actual drilling of a well may be undertaken without a permit.[21] However, once the decision has been made to drill the well, notice of such intention must be forwarded with a fifty-dollar fee to the Division.[22]

The drilling itself may not commence until a permit from the Division has been issued. In granting this drilling permit, the Division is bound by statute to insure compliance with certain qualifications. No permit may be issued for drilling within the corporate limits of a municipality unless the governing body of that municipality has approved the permit application.[23] No drilling may occur within one mile from the state coastline.[24] No drilling may occur on the surface of fresh-water lakes, rivers, and streams. No drilling may occur within one mile inland from the coast without assurance of adequate protection from accidents causing pollution. Permit applications for offshore operations in tidal waters within one to three miles seaward of the corporate limits of a municipality must be approved by the municipality involved.[25]

The statute further requires, as a condition precedent to the issuance of any permit for drilling, regardless of location, that the applicant give evidence of the implementation of pollution control procedures to protect the surrounding area from potential damage from his operations.[26]

As noted above, the nature of the lands involved is a general criterion for permit consideration. One aspect considered by the statute is the optimum location of wells to maximize extraction and minimize waste. To accomplish this, the Division must divide each pool into drilling units with only one well permit allocated to each unit.[27] Should two or more individual owners of tracts be located within a single drilling unit, they may independently agree to develop an integrated operation and share a joint permit.[28] If they fail to agree, the Division shall require an integrated operation.[29]

The Division possesses authority to require or permit the introduction or recycling of gas so as to maximize efficient extraction of petroleum product.[30] The Division also can order pooling or integration of individual tracts to maximize extraction.[31] To be effective, however, this order must be approved by the affected owners of interest; in the event that integration is accepted, the Division must approve a proration plan to protect the correlative rights of the individual tract owners. If the required approval is not gained from the affected owners within six months following the order's issuance, or within such extended period of time prescribed by the Division, then the order shall be automatically revoked. The statute recognizes and encourages the development of private pooling or integration agreements in order to conserve the supply of energy resources. Once approved, such agreements are to be construed as not in violation of any state monopoly or restraint-of-trade laws.[32]

The regulatory mechanisms cited above are actuated in response to physical-technical factors. The statute also vests the Division with regulatory powers triggered by market conditions. In order to prevent waste and inefficient use of oil and gas due to a surplus supply, the Division can limit total production in the state.[33] This authority is to be used when the total amount which can reasonably be produced in Florida exceeds the amount required to meet reasonable in-state market demand.

Control is exercised through the fixing of "allowables" for each pool in the state; when an allowable amount has been established, it must be prorated by the Division among the individual producers in each pool.[34] To date the Division has not utilized this procedure.

To insure constant monitoring of oil and gas operations, the statute required each producer to submit a monthly report to the Division.[35] At the conclusion of operations at a particular well, the producer must notify the Division of his intention to abandon the well and forward a fifteen-dollar fee. The well must then be plugged in accordance with Division regulations.[36]

Sanctions for Non-Conformance

Gas or oil produced in contravention of any of the orders, regulations, or rules of the Division is termed "illegal."[37] The sale, purchase, acquisition, transportation, refining, and handling of illegal oil, gas, or product made therefrom is prohibited;[38] violation requires actual or constructive notice of the illegality.[39]

In addition to this cause of action created for concerned third parties, the statute also creates a $500-per-day civil penalty enforceable by the Division to be imposed for each day the producer operates in contravention of Division rules, regulations, or orders.[40] Payment of this penalty does not affect the cause of action of third parties (*i.e.*, will not transform "illegal" to "legal" gas).

Besides the monetary damages cited above, the Chapter provides criminal sanctions for falsifying or intentionally supplying incomplete facts in the reports or applications required by the Division.[41]

Furthermore, the illegal oil or gas itself must be seized and sold.[42] The proceedings are in rem, authorizing a court-supervised sale following an adverse judgment; proceeds of the sale are used to defray costs of the proceedings, and the remainder is placed in the general revenue fund.[43] Once sold pursuant to the judgment, the oil or gas is considered to be "legal."

An environmental regulatory portion of the statute is an "oil spill" law for wellhead producers. It provides that the producer is absolutely liable to the state for damages incurred from a well accident. The only defenses to this liability available to the producer are pleading and proving that the damage was the result of: (1) an act of war; (2) an act of government; (3) an unforeseeable act of God; or (4) an act or omission by a third party.[44] Any person found liable under these provisions is not liable under the environmental sanctions as found in §§403 or 376 of the Florida Statutes.[45]

Taxation

A state and local tax is levied on the production of oil and gas at the rate of 5 percent of the gross value of the oil or natural gas at the point of production (*i.e.*, market value at the well).[46] The tax consists of two separate charges: (1) the "first" oil and gas tax, an amount equal to 80 percent of the total tax, which is paid into the state treasury to the credit of the general revenue fund; and (2) the "second" oil and gas tax, an amount equal to 20 percent of the total tax, which is paid into the general revenue fund of the board of county commissioners of the county in which the tax is imposed.[47]

No other direct license or excise tax (in addition to the tax just described) may be imposed by the state, county, municipalities, drainage districts, or any other taxing districts upon any person who produces oil or gas by taking from the earth.[48] This provision includes a prohibition against raising the assessed value of land to reflect the value of oil or gas below the surface.

A legislative attempt to prevent indirect taxation by increased land valuation to the extent of the value of oil and gas production *equipment* was rejected by the courts as void and unconstitutional.[49] Thus, this form of indirect taxation is present in the taxation scheme.

Should the legal rights to the oil or natural gas be severed from the rest of the fee estate (which is the case in most oil and gas leases), the rights are taxed separately.[50] The apparent conflict of this direct tax and the exclusivity provision discussed above has been noted by the Attorney General in an opinion which interprets this severed property condition as superseding the exclusivity section when the oil and gas rights have been separated from the fee estate.[51]

III. URANIUM ORE EXPLORATION AND PRODUCTION

ACQUISITION OF PROPERTY INTEREST

As uranium ore production constitutes a relatively new area of activity in the state, no existing statutes specifically address the subject. However, there is applicable statutory language which speaks to mineral leases on state-owned lands. The Trustees' leasing procedure for these basically resembles that for oil and gas leases, including sealed competitive bidding,[52] with the significant difference that mineral leases may not be granted on lands under the "control" of another state agency without the approval of the affected agency.[53] Such approval is not a prerequisite for the granting of oil and gas leases.[54]

ACTUAL EXPLORATIVE AND PRODUCTIVE ACTIVITIES

Permits

Once the lease has been procured, uranium ore exploratory activity comes under jurisdiction of the Division of Interior Resources of the Department of Natural Resources:[55] any explorative operation which would include substantial breaking of the surface requires a permit. Phosphate mining is exempt from this provision on the basis of a legislative determination that phosphate operations are dissimilar to those requiring permits.[56] Inasmuch as the uranium ore deposits in the state exist simultaneously with phosphate deposits, however, the actual mining operation for the uranium ore will be one and the same as for the phosphate. At the time of this writing, no permits have been issued for uranium ore mining.

Taxation

A tax is levied on the business of severing solid minerals from the soils and waters of the state at the rate of 5 percent of the market value of the solid minerals extracted.[57]

As noted above, the uranium deposits in Florida occur simultaneously with phosphate deposits. At present, as only the phosphates are commercially produced in the mining operations, only the phosphate is taxed; but if and when uranium ore is commercially produced from the same operation, its value also will be taxable.[58] Additionally, sludge pits serving as depositories for phosphate wastes contain a substantial commercial quantity of uranium ore which, if extracted, could be taxed to the same extent as new ore.

The tax structure contains a provision by which up to 50 percent of the tax paid may be credited back to the taxpayer if he performs reclamation activities.[59] As with oil and natural gas, should the property rights to the uranium ore be separated from the fee estate, they may be taxed to the extent of their value—a condition which would not exist if the ore were owned in fee simple with the rest of the property.[60]

Footnotes

1. FLA. STAT. § 253.03 (1973).
2. FLA. STAT. § 253.45 (1973).
3. FLA. STAT. § 253.47 (1973).
4. FLA. STAT. § 377.242 (1973).
5. FLA. STAT. § 253.52 (1973).
6. *Id.*
7. FLA. STAT. § 377.242 (1973).
8. State Drilling Lease (rev. Sept. 18, 1973).
9. FLA. STAT. § 253.51 (1973).
10. FLA. STAT. § 253.52 (1973).
11. FLA. STAT. § 253.60 (1973).
12. FLA. STAT. § 253.52 (1973).
13. *Id.*
14. FLA. STAT. § 253.53 (1973).
15. FLA. STAT. § 253.54 (1973).
16. *Id.*
17. FLA. STAT. § 253.55 (1973).
18. *Id.*
19. FLA. STAT. § 377.07 (1973).
20. FLA. STAT. § 377.241 (1973).
21. FLA. STAT. § 377.242 (1973).
22. FLA. STAT. § 377.24(1) (1973).
23. FLA. STAT. § 377.24(5) (1973).
24. FLA. STAT. § 377.242(1) (1973).
25. FLA. STAT. § 377.24(6) (1973).
26. FLA. STAT. § 377.243 (1973).
27. FLA. STAT. § 377.25(2) (1973).
28. FLA. STAT. § 377.27(1) (1973).
29. *Id.*
30. FLA. STAT. § 377.28(1) (1973).
31. FLA. STAT. § 377.28(2) (1973).
32. FLA. STAT. § 377.29 (1973).
33. FLA. STAT. § 377.30(1) (1973).
34. FLA. STAT. § 377.30(2) (1973).
35. FLA. STAT. § 377.23 (1973).
36. FLA. STAT. § 377.24(3) (1973).
37. FLA. STAT. § 377.19(12) (1973).
38. FLA. STAT. § 377.38(1) (1973).
39. FLA. STAT. § 377.38(2) (1973).
40. FLA. STAT. § 377.37(1) (1973).
41. FLA. STAT. § 377.36 (1973).
42. FLA. STAT. § 377.39(1) (1973).
43. FLA. STAT. § 377.39(6) (1973).
44. FLA. STAT. § 377.371(3) (1973).
45. FLA. STAT. § 377.371(4) (1973).
46. FLA. STAT. § 211.02 (1973).
47. *Id.*
48. FLA. STAT. § 211.13 (1973).
49. Small v. Sun Oil Co., 222 So. 2d 196 (Fla. 1969).
50. FLA. STAT. § 193.481 (1973).
51. OP. FLA. ATTY. GEN. 071-149, June 15, 1971.
52. FLA. STAT. § 253.45 (1973).
53. FLA. STAT. § 253.45(1) (1973).
54. *Id.*
55. FLA. STAT. § 377.244(1) (1973).
56. FLA. STAT. § 377.244(2) (1973).
57. FLA. STAT. § 211.31 (1973).
58. Discussion with personnel of the Florida Dept. of Revenue.
59. FLA. STAT. § 211.32 (1973).
60. FLA. STAT. § 193.481 (1973).

Chapter Two

ENERGY PROCESSING

I. INTRODUCTION

Processing activities include petroleum refinement, production of liquefied petroleum gas, coal and oil desulfurization, production of synthetic natural gas, uranium refinement, and coal liquefication and gasification. Performance of the processing activity may involve obtaining various state and federal permits and adhering to certain rules and regulations (depending upon the energy resources and materials needed for conversion), in addition to satisfying local requirements such as land use ordinances.

Any processing activity likely to cause air pollution can only be authorized by the Department of Pollution Control (DPC). Likewise, any effluent discharge likely to pollute navigable waters also must be permitted by both the DPC and the Federal Environmental Protection Agency (EPA). (An explanation of the authority of these agencies with respect to a distinctly separate environmental policy is contained in the sections on water and air quality controls in this chapter.)

In addition to obtaining pollution permits, processing plants and refineries must comply with the rules of the State Fire Marshal, which exist for safety purposes consistent with the police powers. For processing plants, the Florida Administrative Code sets forth regulations in the areas of storage, blending and mixing, dispensing from containers within buildings, electrical equipment, sources of ignition, housekeeping, and fire control.[1] For refineries, the regulations cover location (approving authority must consider measured distance to places of assembly, residences, and businesses as well as adequacy of water supply); storage; fired and unfired pressure vessels; location of processing units; and fire control (special extinguishing equipment is required).[2] The Fire Marshal may also prescribe the type of building to be used for a refinery.[3]

Because uranium is radioactive, its processing or refinement is subject to control beyond pollution permits. The Florida Department of Health and Rehabilitative Services must license such a processing facility.[4] The U.S. Atomic Energy Commission (now Nuclear Regulatory Commission) regulates who may be deemed an authorized recipient of the processed material and to whom it may be sold. The extracted and processed product is regulated by the state until shipping has commenced.

II. WATER QUALITY REGULATION

FEDERAL CONTROLS

The Federal Water Pollution Control Act,[5] as amended in 1972, utilizes technology-based controls as the means for regulating the emission of pollutants in the nation's navigable waters. By July 1977 effluent limitations for point (*i.e.*, stationary) sources will be established, requiring the application by point source polluters of the "best practicable control-technology currently available." By July 1983 more stringent restrictions shall be in effect, which will necessitate the application of the "best available technology economically achievable." Elimination of the discharge of *all* pollutants to navigable waters by 1985 constitutes the ultimate federal goal.

Under the Act, states may still apply their own water quality standards. However, the Administrator of EPA must approve these standards even when they apply only to intrastate waters; if the Administrator does not approve them and the state fails to modify the standards, then the Administrator can promulgate standards acceptable to EPA. In this respect, federal law may have pre-empted state water pollution control for all practical purposes.

Like the Federal Clean Air Act, the Water Act provides for the establishment of effluent limitation standards and guidelines for various categories of point sources, including steam electric generating plants and petroleum refining plants. Final effluent limitations have yet to be established.

The Act also established a permit program, called the "National Pollutant Discharge Elimination System," under which all discharges to navigable waters of the United States will be regulated. Permits for all existing discharges were required to be obtained by December 30, 1974. At that time the discharge permit system for Florida was being implemented by EPA; Florida is expected to receive authorization to issue these permits.

This permit program requires that all discharges into navigable waters comply with federal effluent limitations and also state water quality standards. The proposed effluent limitations will require, among other things, that new sources be designed to utilize offshore closed-cycle evaporative cooling and that existing sources convert from once-through cooling to closed-cycle evaporative cooling. Closed-cycle evaporative cooling, the more costly of the two cooling systems, involves transfer of heat to the atmospheric environment by evaporation of a small portion of the warmed water in the closed or recirculating system. In once-through cooling, a much simpler process, new water is continually pumped through the condenser, warmed by the rejected heat, then discharged into the receiving body of water. Federal law does allow a company to continue using the once-through cooling method if it can be shown that a balanced population of fish, shellfish, and wildlife will be maintained.

STATE CONTROLS

Florida's Air and Water Pollution Control Act[6] was adopted, among other reasons, to:

> conserve . . . protect, maintain, and improve . . . and to provide that no wastes be discharged . . . without first being given the degree of treatment necessary to protect the beneficial uses of such water.[7]

The Department of Pollution Control is charged with the administration of Florida's water pollution control rules and regulations.[8] It has the power to make rules, classify waters into beneficial use categories, establish water quality standards,[9] and develop a permit system for installations which may pollute the water.[10]

The DPC has established water quality standards for five different classifications of waters.[11] These classes are based upon water usage and include the following: (1) public water supplies; (2) shellfish harvesting; (3) recreation, propagation and management of fish and wildlife; (4) agricultural and industrial water supply; and (5) navigation, utility, and industrial uses.[12] The standards—which address such factors as odor, pH, and bacteriological quality—vary widely among the different classifications. If DPC finds a proposed discharge will reduce the quality of the waters below the standard set for them in their class, then a permit request must be denied.[13] However, if the discharge will degrade the quality of the waters but not below the classification standard established for them, a permit may be issued if it is found that such degradation is necessary or desirable under federal standards and under circumstances which are clearly in the public interest.[14]

At the present time, a polluter or potential polluter must acquire a permit from both EPA and the DPC. By January 1975, the DPC was expected to receive EPA's authorization to assume the federal permit program; at this writing, it is not known when such authorization will be received. Following its receipt, however, only a DPC permit will be required.

Should a party fail to procure a standard permit as discussed above, he may apply for a temporary permit. Criteria for issuance of a temporary permit are as follows: (1) *either* there is no feasible method of treating the discharge, but applicant is making a bona fide research effort towards developing one *or* applicant needs time to pollute while installing abatement equipment; *and* (2) there is no present, reasonable alternative means of disposing of waste; *and* (3) denial of a permit will render an extreme hardship on the applicant; *and* (4) granting the temporary permit will be in the public interest.[15]

The DPC has also established specific effluent temperature limitations for new sources which vary according to whether the body of receiving water is located in the northern panhandle or in the southern peninsular region of the state.[16] In addition, allowable discharge temperature varies among types of receiving bodies and, in some cases, seasons of the year;[17] both maximum temperatures and maximum temperature differentials (difference between natural water temperature and effluent temperature) have been established. It should be noted that power companies claim the established limitations preclude plants from locating on estuaries, banks, or rivers unless offstream closed-cycle cooling is utilized and that once-through cooling should therefore be used only at those sites which discharge into "open waters" (waters seaward of the eighteen-foot-depth contour line).[18]

These effluent temperature limitations do not apply to plants already discharging on July 1, 1972. Those plants may continue discharging at their present temperatures so long as they do not "increase the temperature of the receiving body of water so as to cause damage or harm to the aquatic life or vegetation therein or interfere with the beneficial uses assigned to the receiving body of water."[19]

III. AIR QUALITY REGULATION

Federal Controls

On December 31, 1970, amendments to the Federal Clean Air Act were signed into law.[20] The Act, as amended, still left the major responsibility of maintaining and/or improving air quality with the states but required the Administrator of the Environmental Protection Agency to establish national primary and secondary ambient air quality standards with respect to various pollutants.[21] (Ambient air is the air we breathe.) Primary ambient air quality standards are those which are necessary for protection of the public health.[22] Secondary standards are those which are necessary for protection of the public welfare. "Public welfare" includes the protection of such things as crops, wildlife, clothing, weather, visibility, and comfort.

By the end of April, 1971, the Administrator had issued air quality criteria and control techniques for six pollutants: sulfur dioxide, particulate matter, carbon monoxide, photochemical oxidants, hydrocarbons, and nitrogen oxides.[23] The Administrator established emission standards for these pollutants for all *new* point sources which threaten public health or welfare by contributing significantly to air pollution.[24] (Emission standards apply to the air quality as measured at the air pollutant source.) These standards were promulgated to insure that new stationary sources be built and maintained in such a way that emissions would be reduced as much as possible.[25] A list of stationary sources (including fossil fuel steam generating plants) was issued, and states were told to require construction permits to insure—before construction or modification of such a source commenced—that the Administrator's performance standards would be met.[26]

The standards set reflect the degree of emission limitation achievable through the application of the best system of emission reduction demonstrated to be currently available.[27]

These Clean Air Amendments also required states to establish their own standards in such a way as to prohibit significant deterioration of existing air quality in those regions where the air already was cleaner than required by the national standards.[28]

Following publication of the Administrator's standards, the states were required to submit their plans for achieving the specified air quality. The state plans were to be submitted within nine months and were to provide for attainment of the national primary standards within three years.[29] These primary standards must be met by July 1, 1975;[30] secondary standards must be achieved within a reasonable time thereafter.

In addition, states were required to implement plans for air pollution episodes. An "episode" describes a condition which exists when meteorological conditions and rates of discharge of air pollutants combine to produce pollutant levels in the atmosphere which, if sustained, can lead to a substantial threat to the health of the people.[31] Coal- or oil-fired electricity generation facilities, coal- or oil-fired process steam generating facilities, and petroleum refining operations are specifically required under the Amendments to have available preplanned abatement strategies designed to reduce emissions for the duration of the threatening condition.[32]

Vehicle and aircraft emission standards also were established pursuant to the Clean Air Amendments. The Administrator was granted the power to control or prohibit the sale of any fuel or fuel additive if the use of such product would endanger the public health and welfare or impair to a significant degree the performance of any emission control device in general use.[33] Similarly, the Federal Aviation Act authorized the promulgation of regulations establishing standards for aircraft fuels and fuel additives for the purpose of controlling or eliminating aircraft emissions.[34]

STATE CONTROLS

The Florida Air and Water Pollution Control Act was adopted, among other reasons, to:

> . . . achieve and maintain such levels of air quality as will protect human health and safety, and to the greatest degree practicable, prevent injury to plant and animal life and property, foster comfort and convenience of the people, promote the economic and social development of this state and facilitate the enjoyment of the natural attractions of this state.[35]

Administration of the Act was charged to the Department of Pollution Control. The head of the DPC is the Pollution Control Board (PCB), composed of five citizens appointed by the Governor and subject to confirmation by the Senate.[36]

Powers and Duties of the DPC

The powers and duties of the DPC include: development of long-range plans for air quality control and pollution abatement; supervision of the administration and enforcement of the laws, rules, and regulations pertaining to air pollution; rule making; establishment of ambient air quality standards; development of a permit system for installations that may pollute the air; consultation with parties who are acquiring pollution control devices regarding the efficacy of such devices; providing advice and cooperation to other state agencies concerning provisions of this Act; and performance of other activities necessary to control and prohibit air pollution.[37]

In conjunction with the above duties and the mandate of the Clean Air Amendments, the DPC submitted a "Florida Air Implementation Plan" to EPA in January of 1972. The plan for air pollution control was finally approved, and its ambient air quality standards, emission standards, episode control strategies, and permit requirements were codified in Chapter 17 of the Florida Administrative Code.

Ambient Air Quality Standards. DPC rules require attainment of the national secondary ambient air quality standards by July 1, 1975.[38] These rules are more stringent than the national guidelines (the Clean Air Amendments only require attainment of the primary standards by that date). Furthermore, portions of the national secondary standards for sulfur dioxide emissions have been recently revoked by EPA, but Florida continues to use those standards as its goal.[39]

For Dade, Broward, and Palm Beach counties standards even stricter than the national secondary standards were adopted because of meteorological conditions and known air quality.[40]

Emission Standards. In addition to ambient air quality standards, the DPC has adopted emission standards identical to those recommended by the EPA Administrator as being the most stringent which could reasonably be applied under present technology. These emission standards must be met not only by new sources (as required by the Clean Air Amendments) but by existing sources also. The rules of the DPC require polluters to submit compliance schedules to ensure the attainment of these standards by July 1, 1975.

Compliance Schedules. Most stationary sources chose to base their compliance schedules upon the use of low-sulfur fuel as opposed to installation of the gas desulfurization units (stack scrubbers) or fuel desulfurization facilities. The DPC, by conditions set forth in compliance schedules, or orders, in effect required the use of low-sulfur fuel.

Since the DPC allowed this method of compliance, it confronted a problem during the fuel shortage of the 1973-74 winter: low-sulfur fuel was not available in sufficient quantities to meet the needs of the generating facilities. Owners of steam generating plants faced alternatives of shutting down or violating Florida Statute §403 unless the sulfur dioxide standards were modified. The DPC felt that closing of steam generators would constitute a severe threat to the public health, safety, and welfare because production of electricity would cease as a result. The DPC foresaw that in many cases unavailability of low-sulfur fuel may not be predicted sufficiently in advance to allow the required public notice and hearing when a company needed to convert to higher-sulfur fuel. An expedited procedure to allow conversion was established January 22, 1974, and remained in effect until July 1, 1974.[41]

Under this emergency rule only a few companies supplied evidence that low-sulfur fuel was unavailable, thus requesting they be allowed to change to a higher-sulfur fuel.

However, many companies were burning high-sulfur fuel as they had not yet converted to low-sulfur fuel when the unavailability of the latter caused the Federal Energy Policy Office (now Federal Energy Administration) to establish a list of mandatory priorities for use of low-sulfur fuel. During this period—December 7, 1973 through December 7, 1974—electricity generating plants were not allowed to switch to a fuel lower in sulfur than the one they were burning at that time nor change from the use of coal to oil, unless such changes were necessary to meet the federal primary air quality standards. This action seemed aimed at insuring that all generating facilities would receive fuel of such a sulfur content as to allow them to at least meet primary standards and, therefore, avoid the necessity of shutdowns. Only companies located in Hillsborough County were in this position and, consequently, only they were left with the necessity of switching to low-sulfur fuel. Because companies could no longer change fuels, compliance schedules were not being met. In January the DPC, facing alternatives of not enforcing the schedules or changing them, adopted a rule relieving companies of compliance responsibility and ording them to submit revised schedules by July 1974.[42] Reasons cited for permitting non-compliance stressed the insufficiency of accessible information regarding future availability of low-sulfur fuel as well as—on a reasonable time schedule—of fuel gas or fuel desulfurization. It was hoped that by July this information would be available and that the federal government would have acted. As of March 1975, public workshops were still being held on these and other issues.

Construction Permits. Regarding construction of new point sources, the DPC in its rules provides for a permit system which is not only applicable to the sources recommended by the Administrator but also applies, before commencement of construction, to any stationary installation which can reasonably be expected to be a source of pollution.[43] If it appears that such proposed installation will cause pollution in violation of Florida's Air and Water Pollution Control Act or any of the rules and regulations promulgated under it, then the permit may not be issued.

Energy-related facilities which are subject to this permit system include coal cleaning installations, petroleum refineries and petrochemical operations, petroleum storage facilities (tanks and bulk terminals), and fossil fuel steam electricity plants. (All of the preceding have been deemed major sources of sulfur dioxide and/or particulate matter pollutants under the Code of Federal Regulations.)[44]

Non-Degradation

In response to the federal requirement that states implement a procedure for preventing significant deterioration of present air quality, Florida adopted a non-degradation policy in January of 1972.[45] This policy is embodied in rules prohibiting *any* emission of any air pollutant which could degrade the quality of air in a county to a level below the quality that existed on January 18, 1972. Taken literally, this would mean that no new sources of pollution, however well controlled, could be built in "clean counties" until the air quality in those counties became *even better* than it was on that baseline date. While industry has argued that this forces more building to occur in the dirtier areas of the state where one must only meet established emission standards, in practice this is not so. Though industry complains that the rule looms as a basis for potential lawsuits, it has never been enforced literally; companies desiring to build in non-degradation areas have simply had to use the best available emission control technology.

Because of the impracticability of enforcing the non-degradation rule (since the air quality of many counties on January 18, 1972, is not known and since a certain amount of deterioration would be undetectable by presently available measuring devices), DPC is presently considering a rule change. The proposed amendment, presently being debated at various workshops and hearings, would prohibit only *significant* deterioration of air quality, "significant" being defined in terms of specific measurable increments for each pollutant.

Air Pollution Episodes

In response to the federal mandate, Florida adopted a three-state plan for reducing air pollution when meteorological conditions and rates of polluting discharges have combined to produce pollutant levels in the atmosphere which, if sustained, will threaten the health of the people. Florida's plan has classified episodes into three levels: alert, warning, and emergency. Determination of levels is accomplished by taking readings at the various monitoring stations and comparing these readings to the pollutant levels established in Chapter 17-2.06 of the Florida Administrative Code.

Florida's Episode Tables set forth a general plan for reducing pollutants to the pre-alert level. The plan includes such measures as the use of low-ash-and-sulfur-content fuels by generating facilities at the alert stage and total prohibition of all but emergency vehicular traffic at the emergency stage.[46] Coal- or oil-fired electricity generating facilities, coal- or oil-fired process steam generating facilities, and petroleum refining operations are specifically required under the Clean Air Amendments to have available pre-planned abatement strategies designed to reduce emissions for the duration of the condition.[47] Florida has allowed itself the option of designating additional pollution sources which may be required to submit pre-planned abatement strategies, but to date none have been so designated.[48]

IV. LAND USE REGULATION

Land use regulations impact upon the overall energy situation in two ways: (1) they affect the location of energy-productive facilities and (2) they affect the location of energy-consumptive developments.

ACQUISITION

Before energy can be produced and transmitted, land must be acquired, or an easement or license must be granted. The land, easement, or license may be obtained from a private person or from a public entity. One such public entity is county government.

County governments have the authority to sell or lease any real property belonging to the county.[49] A sale must go to the highest bidder while a lease may go to the bidder serving the "highest public interest." The authority of the county commissioners to accept the lease bid which serves the "highest public interest" gives them the potential for making energy policy decisions in the best interest of their community.

County governments also possess authority to grant licenses to any person for the construction, maintenance, repair, operation, or removal of lines used for the transmission of gas, power, or other public utilities under, on, over, across, or along any county highway.[50] This authority extends to any public road or highway acquired by the county and lying outside the corporate limits of any municipality.

Another public entity from which land may be acquired is the Board of Trustees of the Internal Improvement Trust Fund.[51] The Trustees hold title to all sovereign lands (including those granted the state by the federal government) and the tidal areas, marshes, and bottom lands of the state.[52] The Trustees are authorized to dispose of these lands whenever they determine a conveyance to be in the public interest.[53]

Once the determination to sell the land has been made, the Trustees must send notice of intent to dispose of land to the board of county commissioners wherein the land is situated;[54] the county then has ninety days in which to decide by resolution whether or not to acquire the land at the price the Trustees have set. The county must agree to use the land for public outdoor recreational purposes.[55] However, if a riparian owner exists with respect to any land to be sold by the Trustees, then such owner's rights will predominate.[56]

All contracts and deeds for the sale of land executed by the Trustees must contain a provision reserving an undivided three-fourths interest in all minerals and metals which may exist in, on, or under the conveyed land.[57] The Trustees also must reserve for the state an undivided one-half interest in all the petroleum that is or may be in, on, or under the land, retaining the privileges of mining and development.[58] However, these reserved interests may be sold or released if the particular parcel of land contains a building upon it or if one is proposed to be erected.[59] The sale or release will be transacted, at the Trustees' discretion, upon application by the owner of the title to the particular land; the Trustees must issue a subsequent statement of reason justifying the sale or release.[60]

In addition to its power to sell state lands, the Trustees may lease these lands for the purpose of developing and producing oil and gas. They may also sell or lease the bottom lands for petroleum production purposes. (See the section on "Oil and Natural Gas Exploration and Production" in Chapter One for a further description of this authority.)

Restrictions

Once land has been acquired, the use to which it can be put is often restricted. Municipalities exercise control over the location of energy production and conversion facilities through their zoning powers.[61] The zoning plan adopted by a municipality may also have an effect upon the amount of energy consumed in the area—*e.g.*, plans which locate industrial centers far from housing subdivisions may cause more gasoline to be consumed by workers. Likewise, municipalities which allow developments to spring up on the peripheries of their jurisdictions are faced with the responsibility of extending electricity and other services to them.

While the exercise of local zoning authority does affect energy supply and consumption, an even greater potential influence upon the energy scene is Florida's Environmental Land and Water Management Act of 1972.[62] The specific purpose of this Act is to protect the natural resources and environment of the state; this protection is to be achieved by establishing policies to guide and coordinate local decisions relating to growth and development. The Act thus focuses upon the developer and the roles state, regional, and local land planning agencies shall play in determining whether development may proceed. Development is defined as the carrying out of any building or mining operation or the making of any material change in the use or appearance of any structure or land.[63] Drilling is also included in this definition.[64]

Specifically excluded from the definition of development is the work by any utility or other persons engaged in distribution or transmission of gas or water for purposes of constructing, inspecting, or repairing in established rights-of-way any pipes, cables, utility tunnels, power lines, towers, poles, *etc.*[65] Also excluded is the change in utilization of land or structures from a use within a class specified in an ordinance or rule to another use within the same class.[66]

The Act deals primarily with two types of development: (1) those to be located within environmentally endangered areas that have been designated areas of critical state concern (see below) and (2) those which will exert impact on more than a single county.

Areas of Critical State Concern

The state land planning agency (occasionally receiving input from regional or local agencies) may recommend a location for designation as an Area of Critical State Concern (ACSC).[67] It must cite in its recommendation the dangers which would result from uncontrolled or inadequate development of the tract and the advantages to be gained from coordinated guided development. Specific principles for guiding the development of the area also must be included.

Within forty-five days following receipt, the Administration Commission (Governor and Cabinet) must either reject, accept, or modify the agency's recommendation. An area may be designated as one of critical concern *only if* it meets at least one of the following criteria:[68]

1. The area has significant impact upon environmental, historical, natural, or archaeological resources of regional or statewide importance.
2. The area is significantly affected by or has a significant effect upon an existing or proposed major public facility, tract, or investment. (A major public facility is any publicly owned facility of more than local importance, such as a highway or airport.)
3. The area is a proposed location of major development potential designated in a state land development plan. (This may include the site of a proposed new community.)[69]

If the Administration Commission determines that the recommended area qualifies for designation as one of critical state concern, then it must file a rule so designating the location and setting forth the principles for guiding development. The total amount of the state's land designated as ACSC shall not exceed 5 percent at any given time.[70]

After designation, the local government must then submit for approval existing, new, or modified land development regulations which take into account the principles established in the rule designating the area as well as other factors normally considered.[71]

Any development in such an ACSC must comply with these regulations. Designation of an area as an ACSC does not mean that development cannot continue but rather that development will be closely geared to the carrying capacity of the land. At present only two locations in the state have been designated ACSC; the ability of one of these areas to support an electricity generating plant is now under examination.

Developments of Regional Impact

A Development of Regional Impact (DRI) is any development which—because of its location—could have a substantial effect upon the health, safety, or welfare of citizens of more than one county.[72] Though some feel this is a self-executing definition and thus applicable to any development, the administrators of this Act—the Division of State Planning (DSP)—do not treat it as such. Only those developments specified in the guidelines are considered by them to be DRIs and thus subject to the approval process set forth in the Act.[73] Among the Division's reasons for taking this stand are the amendment to the Act, which requires legislative approval of new guidelines before they become effective, and the need to give sufficient notice to developers. In an "emergency situation" the Governor and Cabinet may make changes in the guidelines, which will become effective immediately but must be approved by the next legislative session or be terminated.[74]

The purpose of designating a development as one of regional impact is to insure that local governments receive assistance in making decisions concerning developments which exert more than local impact and to insure that interested parties are notified of the developments.[75]

At present twelve types have been established as presumed DRIs. This list includes petroleum storage facilities, industrial plants and parks of a certain size or parking capacity, mining operations, and housing developments of specified dimensions. (Refineries and pipelines are being added; the Florida Energy Committee staff has provided proposed guidelines.) If a proposed development falls within a listed category, then the developer must file with the local government an application which furnishes answers to the questions set forth in the regulations.[76] These questions are designed to provide indications of the development's projected impact upon environment, economy, public facilities, public transportation, and people's ability to find housing near their places of employment.

The local government holds hearings upon each application for a development permit; the DSP and the appropriate regional agency are notified of these hearings.[77] After conducting its own study of the proposed DRI, the regional agency recommends to the local government whether or not approval should be granted. It ideally provides the local government with an overview of the regional effect the development would have and also an idea of the cost to the locality in the form of additional public services which must be extended.[78]

The local government must consider the regional agency's recommendation as well as the proposed development's compatibility with any state land development plans and local land development regulations. Though the local government must consider the regional agency's recommendations, it is not yet clear whether it must follow them.

This Act also provides the opportunity for the owner, developer, regional planning agency, or DSP to appeal the local government's development order. The appeal is made to the Land and Water Adjudication Commission (Governor and Cabinet), which may hold hearings of its own and subpoena witnesses. Decisions of the Commission are reviewable by the courts.[79]

As a direct consequence of the DRI process, local governments will be well apprised of the advantages, disadvantages, and necessity of allowing energy-related facilities to be located within their boundaries. A more indirect effect of the DRI process is that the local government will possess information revealing to what extent a new development will tax or increase the availability of energy supply in the area, and how it will affect the waste or inefficiency of energy as a function of reasonable use.

Unquestionably, this DRI procedure affords local governments more information about a proposed development, at an earlier date, than ever before, enabling local officials to base decisions affecting Florida's energy situation upon extensive data.

At present, a new permit application is being designed which requires much information concerning the ability of the serving electric company to meet the demand created by a new development.[80] In addition, a new guideline is being formulated that will specifically bring petroleum refineries, and perhaps other energy conversion facilities, under the DRI process.

The preceding land use regulations do not cover power plant siting, control over which has been vested in the Board of Pollution Control; relevant provisions of this Act are discussed in Chapter Four of the present report under "Siting."

Footnotes

1. 1 Fla. Adm. Code ch. 4A-16.
2. 1 Fla. Adm. Code ch. 4A-3.
3. 1 Fla. Adm. Code ch. 4A-16.91-.95.
4. Fla. Stat. §290.04 (1973).
5. 33 U.S.C. §1151 *et seq.* (1970).
6. Fla. Stat. §§403.011-.182 (1973).
7. Fla. Stat. §403.021(2) (1973).
8. Fla. Stat. §403.061 (1973).
9. *Id.*
10. Fla. Stat. §403.021 (1973).
11. 4 Fla. Adm. Code ch. 17-3.06.
12. 4 Fla. Adm. Code ch. 17-3.07 to .11.
13. Fla. Stat. §403.088(3)(c) (1973).
14. *Id.*
15. Fla. Stat. §§403.088(4)(a)(1)-(6) (1973).
16. 4 Fla. Adm. Code ch. 17-3.05(3).
17. 4 Fla. Adm. Code ch. 17-3.05(3)(d).
18. *See* Florida Power & Light Company, A Review of State and Federal Water Quality Standards and Proposed Limitations, August 16, 1974 (PSC seminar in Orlando).
19. 4 Fla. Adm. Code ch. 17-3.05(3)(a).
20. Pub. L. No. 91-604.
21. 15 U.S.C. §1857(c)(4) (1970).
22. *Id.*
23. 40 C.F.R. §§50.4-.11.
24. *Id.*
25. *Id.*
26. 40 C.F.R. §§60.40-.46.
27. 42 U.S.C. §1857(c)(6) (1970).
28. 42 U.S.C. §1857(c)(5) (1970).
29. *Id.*
30. 42 U.S.C. §1857(c)(5)(a) (1970).
31. 42 U.S.C. §1857(c)(5)(a)(1) (1970).
32. 40 C.F.R. §52.11.
33. *Id.*
34. 42 U.S.C. §1857(f)(6)(c) (1970).
35. 42 U.S.C. §1857(f)(9) (1970).
36. Fla. Stat. §403.021(2) (1973).
37. Fla. Stat. §403.061 (1973).
38. Fla. Stat. §403.045 (1973).
39. Fla. Stat. §§403.061(1)-(27) (1973).
40. 4 Fla. Adm. Code ch. 17-2.03(2).
41. *See generally* 4 Fla. Adm. Code ch. 17-2.04.
42. 4 Fla. Adm. Code ch. 17-2.05(2).
43. Fla. Stat. §403.087(1) (1973).
44. 40 C.F.R. §§60.1-.154.
45. 4 Fla. Adm. Code ch. 17-2.01.
46. *See generally* 4 Fla. Adm. Code ch. 17-2.06.
47. *Id.*
48. *Aff'd.* March 31, 1975.
49. Fla. Stat. §125.35 (1973).
50. Fla. Stat. §125.42 (1973).
51. Fla. Stat. §253.02 (1973).
52. Fla. Stat. §253.03 (1973).
53. *Id.*
54. Fla. Stat. §253.111 (1973).
55. *Id.*
56. Fla. Stat. §253.38 (1973).
57. Fla. Stat. §270.11 (1973).
58. *Id.*
59. *Id.*
60. *Id.*
61. Fla. Stat. §166.021 (1973).
62. Fla. Stat. §380.01 *et seq.* (1973).
63. Fla. Stat. §380.04(1) (1973).
64. Fla. Stat. §380.04(2)(d) (1973).
65. Fla. Stat. §380.04(3)(b) (1973).
66. Fla. Stat. §380.04(3)(f) (1973).
67. Fla. Stat. §380.05(1)(a) (1973).
68. Fla. Stat. §380.05(1)(b) (1973).
69. Fla. Stat. §380.05(2) (1973).
70. Fla. Stat. §380.05(17) (1973).
71. Fla. Stat. §380.05(5) (1973).
72. Fla. Stat. §380.06(1) (1973).
73. 4 Fla. Adm. Code ch. 22-2.01.
74. Fla. Stat. §380.10 (1973).
75. Fla. Stat. §380.021 (1973).
76. Fla. Stat. §380.06(6) (1973).
77. Fla. Stat. §380.06(7) (1973).
78. Fla. Stat. §380.06(11)(c) (1973).
79. Fla. Stat. §380.07 (1973).
80. 4 Fla. Adm. Code ch. 22-2.01.

Chapter Three

TRANSPORTATION OF ENERGY

I. INTRODUCTION

Authority for regulation of transportation of energy and energy sources is distributed among many state agencies. The scope of the regulations often is determined by the nature of the regulated matter and the mode of transportation utilized.

II. NATURAL GAS

Control over the transport of natural gas within a state is limited due to the extent of federal pre-emption in the area.[1] Within the scope of authority that remains exercisable by the states, safety regulation and eminent domain delegation are the most prominent.

Safety

The Gas Safety Law of 1967[2] applies to all legal entities (both public and private) owning, operating, managing, or controlling any gas transmission or distribution facilities or any other facility for the supply of natural or manufactured gas.[3] Excluded from the purview of this law is LPG in both liquid and solid form;[4] responsibility for promulgating rules and regulations pertaining to transportation of LPG is vested in the Department of Insurance.[5]

Responsibility and authority for the promulgation of safety regulations is vested in the Public Service Commission (PSC).[6] In response to this charge, the PSC has developed and promulgated rules covering the design, fabrication, installation, inspection, and testing aspects of gas transmission systems.[7] The standards utilized in formulation of these rules are those prescribed by the United States Department of Transportation[8] (USDOT) and the National Fire Protection Association.[9] These rules will supersede any promulgated and published by any other state agency or political subdivision.

Violation of the Act or rules promulgated pursuant to it can lead to civil damages up to $200,000 and/or injunctive action by the state.

Eminent Domain

Any corporation authorized to engage in the business of supplying natural gas has a right of eminent domain to survey and lay pipelines (and accessory works) on any land, public or private, as is necessary for the most advantageous route. Included in this delegation of the right are generally all streams, water courses, canals, lakes, bays, gulf, roads, railroad lines, and transmission lines.[10] Of course, just compensation must be paid to private landowners.

If the exercise of this right should be challenged by an agency or individual as contravening environmental policy, the burden is on the challenger to show contravention once the pipeline company has established a prima facie case of conformance.[11]

III. PETROLEUM AND PETROLEUM PRODUCTS

Safety and Environmental Regulations

Water Transport

The Pollutant Spill Prevention and Control Act[12] requires a registration and certification of all "terminal facilities." Within this classification are privately operated waterfront or offshore facilities of any kind which are used for pumping, storing, handling, or transferring petroleum or petroleum products. Certification is also required of any vessel performing loading and unloading operations between a shore facility and an outlying tanker.

These registration certificates are renewable annually upon inspection and reapproval of the terminal facility. Responsibility for the certification process is vested in the Department of Natural Resources with assistance required by the Department of Pollution Control.

The Spill Prevention Act grants the Department of Natural Resources power to insure the safety of waterborne transport. The Department has the authority under this law to conduct vessel safety inspections; the standards by which the inspections are conducted, however, must be identical to the federal safety requirements.[13] These safety inspections apply to any vessel, whether or not it is also classified as a terminal facility. Another mode of control utilized by the DNR to insure safety of waterborne transport is the development and implementation of minimum weather standards for port entry.[14]

To buttress and complement the preventive measures described above, the law contains measures dealing directly with the occurrence of an oil spill. All terminal facilities are required to pay into the Florida Coastal Protection Fund an excise tax of two cents for every barrel of petroleum they handle. Monies from the fund will be used to clean up and rehabilitate the natural resources damaged by a spill; the DNR will seek reimbursement for expenditures from the parties causing the spill.

Liability of the responsible parties from whom reimbursement is sought shall be limited: in the case of a vessel-originated spill, liability may not exceed $14 million or $100 per gross registered ton of such vessel, whichever figure is smaller; in the case of a terminal facility-originated spill, the liability is limited to $8 million. In either case, if willful or gross negligence or misconduct can be shown, the limitations become inoperative.

The accused party in such a reimbursement action may avail himself of four possible defenses: (1) act of war; (2) act of God; (3) act of government; and (4) act or omission of a third party.

Land Transport

The Legislature has established regulations in reference to marking requirements and safety equipment for motor carriers involved in petroleum and petroleum product transport. Rules and regulations which apply to the transportation and handling of petroleum products have been adopted by the State Fire Marshal.[15]

EMINENT DOMAIN

Petroleum pipeline companies in Florida have rights of eminent domain over private land comparable to those delegated to their natural gas counterparts. However, petroleum pipeline companies have no rights over lands held publicly, although this does not preclude their obtaining permission to conduct activities on such land. The critical difference between "right" and "permission" involves the burden of proof in cases of agency opposition to the activity: if the pipeline company is acting under the right of eminent domain, the burden of proof lies with the agency challenging the activity; if the company is seeking permission, it has the burden to prove why the activity should proceed over the agency's objection.[16]

OTHER REGULATION

To monitor the enforcement of the motor fuels tax, the Department of Revenue requires reports by all carriers[17] (including railroads, pipelines, *etc.*) of the amounts, origins, and destinations of specified fuels. As a further check, each carrier[18] or vessel[19] transporting the specified fuels must have available documents showing the amount, origin, and destination of its cargo.

IV. NUCLEAR FUELS

INTERSTATE TRANSPORT

Interstate transportation of nuclear fuels is regulated by federal law with the authority for administration vested in the USDOT.[20] The regulatory structure includes provisions for the packing, marking, loading, and handling of radioactive materials as well as the precautions necessary to determine whether the material is in proper condition for transport. Designation of routes to be used in transportation is also included within this authority.[21]

In Florida, with the exception of the operation and equipment of the carrier vehicle, administration of the federal regulations has been delegated by the USDOT to the Division of Health of the Florida Department of Health and Rehabilitative Services.[22] Thus, the actual "leg work" of nuclear fuel transportation regulation in the state is performed by the Division of Health.

The Florida Department of Insurance has the general power to promulgate rules and regulations concerning operation and equipment of the carrier vehicle. In cases of interstate shipments the rules must parallel the federal requirement.[23]

INTRASTATE TRANSPORT

Transportation of nuclear fuel material wholly within the state (*e.g.*, conveyance of uranium-rich phosphate residue to extraction facilities) is governed by Florida law and, except for carrier vehicle requirements, regulated by the Division of Health.[24] Standards currently in use were drawn from federal sources. The Department of Insurance promulgates carrier safety and equipment regulations[25] which by law must be at least as restrictive as federal standards;[26] for the present, the federal standards have been adopted by the Department.[27]

Footnotes

1. Natural Gas Act, 15 U.S.C. §717(a) *et seq.* (1970).
2. FLA. STAT. § 368.01 *et seq.* (1973).
3. FLA. STAT. § 368.021 (1973).
4. *Id.*
5. FLA. STAT. §527.06 (1973).
6. FLA. STAT. § 368.05 (1973).
7. 4 FLA. ADM. CODE ch. 25-12.
8. Tit. 49, pts. 191-192.
9. Pamphlets 54, 58, 59.
10. FLA. STAT. §361.05 (1973).
11. Seadade, Ind., Inc. v. F.P.L., 245 So. 2d 209 (Fla. 1971).
12. FLA. STAT. § 376.011 (Supp. 1974).
13. *Id.*
14. *Id.*
15. 1 FLA. ADM. CODE ch. 4A.
16. Seadade, Ind., Inc. v. F.P.L., 245 So. 2d 209 (Fla. 1971).
17. FLA. STAT. §206.09 (1973).
18. FLA. STAT. §206.20 (1973).
19. FLA. STAT. §206.204 (1973).
20. 18 U.S.C. §831 *et seq.* (1970); 49 U.S.C. §§1421, 1430, 1657 (1970); 49 C.F.R. pts. 170-189.
21. *Id.*
22. FLA. STAT. § 381.512 (1973).
23. FLA. STAT. § 316.286 (1973).
24. FLA. STAT. § 381.512 (1973).
25. FLA. STAT. § 316.286 (1973).
26. *Id.*
27. 3 FLA. ADM. CODE ch. 10D-63.

Chapter Four
ELECTRICITY

I. INTRODUCTION

Electricity is a secondary energy source—*i.e.*, it is produced from primary energy sources, most notably fossil fuels, and used as an energy source itself. In other words, electricity is man-made, manufactured energy which is employed by man to power other man-made products. Because of this dual nature, the pattern of state authority over electrical production differs from that exercised over other energy sources. The authority exerted in the electrical area is itself differentiated according to the type of company producing electricity (investor-owned, rural electric cooperative, or municipal utility) and the nature of the activity in which the utility is involved (generation and transmission or sale).

II. GENERATION

Generation of electricity is reasonably analogous to processing other energy sources into usable products, except that in generation the raw material used is the product of the processing procedure performed on other energy sources. Therefore, it is probable that any state control which impacts upon primary fuel processing will indirectly affect generation of electricity in a similar manner. Since these controls have been discussed above, this section will emphasize state regulations directed specifically toward the generation of electricity.

Environmental Controls

Florida has been divided into air quality control regions for the purpose of developing and implementing federal air control standards, with the responsibility for promulgating, monitoring, and enforcing these standards vested in the Department of Pollution Control. The ambient air quality standards adopted for the state by the Department conform to the secondary or more stringent standards proposed by the federal government.

The regulations promulgated by the Department which apply specifically to fossil fuel steam generators are published in Chapter 17-2 of the Florida Administrative Code. These regulations establish mandatory emission standards which reflect the most stringent requirements proposed by the federal government that can reasonably be applied under present technology.

In addition to meeting the normal emission standards established in the regulations, coal- or oil-fired electrical generating facilities and coal- or oil-fired process steam generating facilities are specifically required to have pre-planned abatement strategies designed to reduce emissions further in the event of an air pollution episode.

Normally, the authority for the Department of Pollution Control's jurisdiction over construction and operating permits is derived from the same general law which establishes the DPC's monitoring authority.[1] In the case of electrical generating facilities, however, construction and operating regulation is derived from legislation specifically directed toward power plants.[2]

Siting

The Electrical Power Plant Siting Act[3] represents legislative recognition of the need for a centralized and coordinated system for the review of a proposed electrical generation facility. The DPC is statutorily designated to be the state agency responsible for executing the policy contained in the Act; while the DPC processes specific site plan applications, the Act also provides for the Division of State Planning (DSP) to perform a concurrent general function.

Beginning January 1, 1974, each "electrical utility" is required to submit to the DSP a ten-year plan of projected needs and proposed sites. These submitted plans will be studied and classified as suitable or unsuitable within twelve months following receipt. In conducting its review the DSP must consider the need for electrical power in the area to be served; the environmental impact on any proposed site; possible alternatives; and the views of appropriate local, state, and federal agencies.

The DSP has promulgated a uniform set of rules and instructions for the presentation of required information. All ten-year site plans must contain the following categories of information: (1) a description of existing facilities; (2) a forecast of facilities requirements; (3) descriptions of proposed sites and facilities; and (4) a preliminary assessment of the environmental effects of any proposed site.

When a utility intends to develop a particular site, it will initially file a site certification application with the DPC; within ten days of receipt, the DPC must notify the DSP and the Public Service Commission (PSC). The DSP will review the specific site plan in relation to the submitted ten-year plan, while the PSC will review the present and future needs for electrical generating capacity of the area of the proposed site. Based on its review, each agency will submit a recommendation to the DPC within three months after notification.

Concurrent with the DSP and the PSC reviews, the DPC will conduct a study which must consider the following criteria: cooling system requirements; proximity to load centers; proximity to navigable water and other transportation systems; soil and foundation conditions; availability of water; land use; accessibility to transmission facilities; and environmental impact.

Also, within sixty days following application, the DPC must conduct an initial hearing near the proposed site to determine whether the site is consistent with land use planning and zoning ordinances in effect at the date of application. Should an inconsistency be determined, the applicant then may petition the appropriate authorities for a rezoning. If such a petition is denied, the applicant may appeal the denial to the DPC. Upon reviewing the appeal the DPC has two options: it may deny the appeal, thereby terminating consideration of the site application pending a rezoning decision by the appropriate authorities; or upon finding that the proposed site is in the public interest, it may grant a nonconforming use variance. This variance would be effective against all state or local land use ordinances or plans.

No later than twelve months following receipt of the application, the DPC must make a recommendation to the Pollution Control Board based on the hearings conducted and recommendations received. Within sixty days after receiving the DPC's report, the Board must either approve, approve with modifications, or deny issuance of a certificate.

The issued certificate represents a binding agreement to comply with the provisions therein. The issuance of such certification is in lieu of any similar document required under Florida Statutes §§161, 253, 298, 370, 373, 378, 380, 381, and 387 but does not affect PSC rate procedures under §366 nor affect compliance with local building codes, standards, and regulations.

III. TRANSMISSION

The power of eminent domain has been delegated to investor-owned utilities,[4] municipal utilities,[5] and rural electric cooperatives.[6] Despite the all-encompassing language of the siting statute, this power effectively relates to the installation of transmission lines.

Use of the power of eminent domain is subject to the provisions of the Land and Water Management Act.[7] The rules promulgated by the Division of State Planning pursuant to this Act provide that any electrical transmission line having a capacity of 230 kv or more and crossing a county line[8] constitutes a development of regional impact. This designation requires that approval of such a transmission line be preceded by filing of the environmental impact statements required by the Act. The provision does not apply to construction of transmission facilities over existing rights-of-way.

IV. SALES

The marketing of electrical energy in Florida is performed by three distinct types of utility entities: investor-owned utilities, rural electric cooperatives, and municipal utilities. Each of these is addressed in separate statutes, and the marketing and operational activities of each are, to varying degrees, subject to state regulatory authority through the auspices of the Public Service Commission.

INVESTOR-OWNED UTILITIES

The Legislature in 1951 determined that the regulation of investor-owned (*i.e.*, public) utilities was in the public interest, and such regulation was deemed to be an exercise of the police power of the state for the protection of the public welfare.[9]

Authority to perform the regulatory function was vested in the Public Service Commission. The jurisdiction of the PSC over public utilities extends to rates, service, and sales of certain forms of security.[10] This jurisdiction is exclusive of and superior to all other boards, agencies, and municipalities. The pre-emptive authority of the PSC does not extend to the police power of municipalities over thoroughfares, nor to taxing powers or franchise authority under Chapter 167.[11]

In the exercise of jurisdiction over public utilities, the PSC has the power to:

1. Prescribe fair and reasonable rates and charges, classifications, standards of quality and measurement, and service rules.
2. Prescribe a uniform system of accounts which, among other functions, establishes adequate and fair depreciation rates.
3. Require the filing by each public utility of periodic reports and other necessary data.
4. Require repairs and improvements, additions and extensions to the facilities of any public utility needed to secure adequate service and to promote convenience for those reasonably entitled to such.
5. Promulgate rules and regulations necessary for the enforcement of the provisions of the statute.
6. Exercise all judicial powers necessary or convenient to the full exercise of its jurisdiction.[12]

In addition to the powers enumerated above, the PSC has the authority and—upon request by a consumer—the duty to test metering or measuring appliances used by a public utility in the delivery of its product.[13]

The power to prescribe and fix rates is expressly delineated in the Chapter. Each public utility shall maintain a service schedule on file with the PSC,[14] and no such utility may—directly or indirectly—receive any rate not on file. Any change in the rate schedule must be preceded by a request to the PSC for permission to effect the change.

In reviewing such a request, the PSC must investigate and determine the actual legitimate costs of the utility which are employed in public service. A record of this net investment by the public utility into property "used and useful" in serving the public is to be maintained by the PSC, and this figure minus accrued depreciation will be utilized for rate-making purposes. The standard set forth for "actual legitimate" costs is that they represent money "honestly and prudently" invested by the utility.

Upon review, should the PSC find that the rates charged by the utility are insufficient to yield reasonable compensation for services rendered, a public hearing is ordered, and just and reasonable rates are determined.

The PSC upon its own motion may determine that the rates charged by a public utility or the rules, regulations, or practices of the utility affecting rates are unjust, unreasonable, unjustly discriminatory, or in violation of the law. In such case a public hearing is held and upon an affirmative finding on the allegations, the PSC can adjust rates accordingly.[15]

While a large portion of the Chapter deals with the regulatory relationship between the PSC and individual utilities, the 1974 Legislature increased the Commission's responsibility and authority to include development and maintenance of adequate, reliable energy grids in the state.[16]

Any public utility or any person in interest dissatisfied with any order of the Commission may have it reviewed by the Supreme Court by certiorari.[17]

RURAL ELECTRIC COOPERATIVES

To encourage the promotion and extension of electrical energy into the rural areas of the state, Florida law provides for the formation of cooperative, non-profit electrical corporations.[18] The function of these corporations is to provide electricity to those rural areas[19] which are not being served by any privately or governmentally owned public utility; it is not intended that such a corporation be a competitor in areas where electricity is available from an existing utility.[20]

Consistent with the legislative purpose, a rural electric cooperative (REC) has authority to generate, manufacture, purchase, acquire, accumulate, and transmit electricity. Included in this authority is the power to supply electrical energy to its members, to governmental agencies and political subdivisions, and to other persons[21] whose number shall not exceed 10 percent of the cooperative's members. The scope of this distribution power is bounded by the non-competitive factor in REC authority as discussed above.

As an adjunct to the function of supplying electrical energy, a cooperative can finance electrical installations or fixtures. A cooperative may join other cooperatives as a member for the purpose of improving its ability to supply energy[22] and may also consolidate[23] and merge[24] with another REC upon the approval of its members.

State authority over rural electric cooperatives was expanded in the 1974 session of the legislature with the passage of the "Grid Bill."[25] This legislation gave the Public Service Commission authority over RECs to include prescription of uniform accounting systems and uniform rate structures. The law also empowered the PSC to require electric power conservation and reliability within a coordinated grid for operational as well as emergency purposes. To achieve desired grid reliability, the PSC was granted the authority to alter territorial agreements and resolve territorial disputes among public utilities, RECs, and municipal electric utilities.

MUNICIPAL ELECTRIC UTILITIES

Prior to 1973, legislative control over municipal electric utilities was relatively comprehensive.[26] However, the Municipal Home Rule Powers Act of 1973 embodied legislative recognition that the powers exercised by a municipality, including the operation of an electrical utility,[27] were of constitutional origin[28] and were subject only to constitutional limitations or express pre-emptions to the state by general law.

Constitutional Limitations

A salient constitutional limitation on the operation of municipal electric utilities was removed with the recent passage of a constitutional amendment.[29] Prior to its passage, municipalities were prohibited from associating with private business to develop joint electrical generation or transmission facilities.[30] This prohibition prevented municipalities benefiting from the "economics of scale" in large-scale production. With the elimination of this provision, municipalities may now jointly own, construct, or operate electrical facilities with any other legal entity. Thus, consolidated efforts may be undertaken by all electrical utilities to achieve an efficient generation system for the state.

State Pre-Emption

As noted above, the 1973 Legislature made substantive changes in the general scheme of state-local relationships. One of the statutes repealed has dealt relatively specifically with the operation of municipal electric utilities. At the close of the 1973 legislative session, control over municipal utilities was effectively left to the municipalities, subject to pre-emption to the state by general law. At that time such pre-emptive authority was exercised by the state in general areas such as facility siting and pollution control, whereas the specific proprietary functions of the utilities remained under local jurisdiction.

Provisions of legislation passed in 1974 may indicate a return to comprehensive state controls over the operational functions of municipal utilities. The jurisdiction of the Public Service Commission was extended to include municipal electric utilities for the purposes of such proprietary functions as systems and classifications of accounts, rate structures, and grid coordination as well as jurisdictional authority in questions of service territories.

Footnotes

1. 4 Fla. Adm. Code ch. 17-2.
2. Fla. Stat. § 403.011 *et seq.* (1973).
3. Fla. Stat. § 403.501 *et seq.* (1973).
4. Fla. Stat. § 361.01 (1973).
5. Fla. Stat. § 180.22 (1973).
6. Fla. Stat. § 425.59 (1973).
7. Fla. Stat. § 380.01 *et seq.* (1973).
8. 4 Fla. Adm. Code ch. 22F-2.03.
9. Fla. Stat. § 366.01 (1973).
10. Fla. Stat. § 366.04 (1973).
11. Fla. Stat. § 366.11 (1973).
12. Fla. Stat. § 366.05(1) (1973).
13. Fla. Stat. § § 366.05(3)-(6) (1973).
14. Fla. Stat. § 366.06(1) (1973).
15. Fla. Stat. § 366.07 (1973).
16. Fla. Stat. § § 366.05(7)-(8) (Supp. 1974).
17. Fla. Stat. § 366.10 (1973).
18. Fla. Stat. § 425.01 *et seq.* (1973).
19. Fla. Stat. § 425.02 (1973).
20. TECO v. Withlacoochee Electric Cooperative, Inc., 222 So. 2d 471 (Fla. 1960).
21. As defined in Fla. Stat. § 425.03(2) (1973).
22. Fla. Stat. § 425.04 (1973).
23. Fla. Stat. § 425.14 (1973).
24. Fla. Stat. § 425.15 (1973).
25. Fla. Stat. § 366.04 (Supp. 1974).
26. Ch. 4600, § § 1-14, [1897] Fla. Laws (repealed 1973).
27. Fla. Stat. § 166.021 (1973).
28. Fla. Const. art. VIII (1968).
29. Fla. Const. art. VII, § 10(d) (1974).
30. *Id.*

Chapter Five
ENERGY USE

I. INTRODUCTION

The state exercises extensive control over the utilization of energy, although the impact of most laws governing consumption is indirect in that their primary purpose is implementation of other policies. The basic focus of the majority of these rules and regulations is either consumer protection, public safety and welfare, revenue generation, or general planning and development.

II. CONSUMER PROTECTION

QUALITY CONTROL

The Department of Agriculture and Consumer Services is empowered to inspect fuel oil and gasoline offered for sale in Florida, for the purpose of determining the quality of the product[1] and the accuracy of the dispensing equipment employed.[2] In addition, the law requires all parties offering gasoline, kerosine, or mineral oil for power, illuminating, cooking, or heating purposes to furnish the name or trademark of the product they wish to sell, with the manufacturer's name and address, to the Department.[3]

SALES AND RATE REGULATION

The Department of Agriculture and Consumer Services also has the duty of monitoring the sales of liquid fuels for the purpose of detecting fraudulent or deceptive trade practices.[4]

The Department of Transportation is charged with control over the leasing of state lands for service station facilities along the Florida Turnpike.[5] Presently no more than 50 percent of the service stations can market the same brand of gasoline. The purpose behind this legislation is to insure a choice of motor fuels to Florida turnpike users.

As an aid to competition, the statutes presently provide that no producer or refiner (or its subsidiary) can operate, with company personnel, more than 3 percent of the service stations retailing its product; the law also prohibits companies from discriminating against independents on equipment rental charges. Enforcement of the provisions of this Act is charged to the Department of Agriculture and Consumer Services.

Sales of intrastate transportation services are regulated by the Public Service Commission (PSC). The scope of the PSC's authority includes air carriers,[6] water carriers,[7] rail carriers,[8] and motor carriers;[9] regulation extends from the development of general rate schedules for freight and passenger service to the approval of specific routes for such service.

The authority of the PSC over rate control places the Commission in an excellent position to regulate demand among competing modes of transportation. At present, the statutory authority of the PSC is limited to the determination of whether a proposed rate is "fair and reasonable" with relation to the cost of service provided. Should it be found that competing modes have different energy efficiencies, it might be desirable to include an energy consideration into the "fair and reasonable" standard. By doing so and adjusting rates accordingly, consumers could be encouraged to utilize the most energy-efficient mode.

In a similar manner, the PSC could wield its authority over route approval—especially in the area of motor carriers—to promote use of the most energy-efficient mode of transportation. Present provisions require a review of the impact on transportation and transportation facilities of a proposed motor carrier route prior to approval;[10] it may be desirable to include also a determination of the effect on energy consumption by the transportation sector in the area served by the route. As discussed below in the section on planning and development, the DOT has the authority to develop general master plans for the state's transportation profile. Although the objective of energy efficiency may be considered during development of the master plans, it will not be achieved unless the PSC takes it into consideration when approving specific routes.

Actual operation of a motor vehicle "for hire" requires a permit from the PSC[11] (distinct from the certificate required for route approval discussed above). Issuance of the permit subjects the permittee to the rules and regulations of the Commission concerning operations of such vehicles. An exception to the Commission's authority occurs in the area of "taxi cab" (limited passenger) regulation. Regulation—including permitting—of any "taxi" operating wholly within the limits of any incorporated city or town and the immediate suburban area may be exercised by that municipality.[12] Although not expressly stated, it appears that county governments have concurrent authority with the PSC to regulate taxi cabs in the unincorporated areas of counties.[13] This pattern of overlapping authority could hinder future efforts to develop increased multi-passenger systems in the event that multiple-passenger vehicles prove more energy-efficient than single-passenger conveyances.

III. PUBLIC SAFETY AND WELFARE

The sale of liquefied petroleum gas, as well as the sale and manufacture of LPG appliances within the state, is controlled by the Department of Insurance through a licensing procedure[14] intended to insure the safest practical use of the product. Pursuant to this objective, the Department of Insurance is authorized to promulgate minimum standards covering the design, construction, location, installation, and operation of equipment used for the storing and handling of LPG and the actual transporting of LPG by tank truck and tank trailer.

The state also regulates construction, plumbing, and electrical contracting in Florida.

In the area of plumbing, the statutes provide for licensing certification of the practitioners,[15] inspection and certification of each plumbing installation,[16] and a minimum set of standards for plumbing installations.[17] State law further provides for local participation and input in both the licensing process (through municipality-wide licensing boards)[18] and the establishment of standards.[19] As solar equipment involves plumbing apparatus, added provisions for solar installers and solar installation may be required. The Legislature already has recognized this need with the passage of Chapter 74-361, Laws of Florida (F.S. §553.87, Supp. 1974), which amended the plumbing code to require that installations be amenable to future conversion to solar water heating systems.

Electrical contractors and installation are controlled in much the same manner as plumbing: provisions for contractor certification[20] and a set of electrical standards[21] are contained in the statutes. As with plumbing, local input is allowed in the development of installation standards to the extent that municipalities may promulgate standards of a more stringent nature.[22] As opposed to plumbing, certification of contractors is delegated to a state-wide rather than a municipality-wide board.

Construction per se was addressed in the 1974 session by legislation which will eventually result in the promulgation of a state building code.[23] Administration of the development of the code and supervision of its implementation is vested in the Bureau of Codes and Standards within the Department of Community Affairs. Again, the developed code will represent a set of minimum standards with local governmental units free to adopt more stringent requirements. The most significant feature in the new legislation was the inclusion of energy conservation among the criteria to be considered when formulating standards for the code.

As a public safety measure, the state requires automobiles[24] and aircraft[25] to be registered with the Department of Highway Safety and Motor Vehicles. While a greater impact on energy would result from revision of the incident tax schedule (see section immediately below), the information collected through registration could form an excellent data base for energy research.

IV. TAXATION

All forms of taxation, due to their economic impact, affect energy use either directly or indirectly. The most salient of these are discussed in the following sections.

MUNICIPAL TAX

Under Florida law a tax may be levied on purchases of metered or bottled natural gas (LPG) and on purchases of electricity, with the exception that the portion of the purchase price reflecting the fuel adjustment computation is exempt from taxation.[26] (However, the sale of natural gas to a public or private utility—either for resale or for use in the generation of electricity—is not taxable.) The tax is imposed by towns and municipalities and may not exceed 10 percent of the purchase price. A 1972 Florida Supreme Court decision may provide authority for chartered counties to also levy this excise tax:[27] that decision stated that Article 8, § 1(g) of the 1968 Constitution vests in a charter county the authority to levy any tax, not inconsistent with general or special law, as is permitted municipalities. Unless precluded by law, therefore, a charter county may impose by ordinance any tax in the area of its tax jurisdiction which a municipality may impose.

The statute limits the amount of the tax to 10 percent of the purchase price, as noted above; but that is a ceiling, and a municipality is free to set any figure up to that amount. Very few towns actually levy the full allowable 10 percent, and the percentage levied varies from town to town. The funds received from this tax shall be expended for municipal purposes only.[28]

UTILITIES TAX

As provided by law, every person receiving payment for natural gas or electricity used for lighting, heating, or power generation purposes shall report to the Department of Revenue the total amount of gross receipts from such business conducted within the state and pay into the treasury a tax amounting to $1.50 per each $100 of gross receipts.[29] This requirement pertains also to municipal corporations, with certain exemptions.[30]

"Gross receipts" do not include gross receipts of business derived from the sale of natural gas to a public or private utility either for resale or for use as a fuel in the generation of electricity. It should be noted also that LPG sold and delivered in liquid form is not subject to the gross receipts tax. Gross receipts are taxed only if the LPG is supplied or billed to the customer as a gas or in a gaseous form.

The money collected from this tax is deposited in the Institutions of Higher Learning and Junior Colleges Capital Outlay and Debt Service Trust Fund.[31] In addition, there is a special levy on gas and electric companies under the jurisdiction of the Florida Public Service Commission at the rate of one-eighth of 1 percent of the gross operating revenue for 1969 and each year thereafter received from intrastate business conducted in Florida. These monies are used by the PSC in the performance of its functions and duties as provided by law.

TAXATION OF MOTOR FUELS

Prior to the advent of the motor vehicle, almost all the funds available for highway, road, and street purposes were derived from specific property tax levies or from the general funds of the administering governmental units. Revenues for road construction were derived from property taxes, poll taxes, and "labor" taxes.

In 1919 Oregon enacted the first motor fuel tax law. This tax was such a successful revenue producer that by 1929 all states had such taxes ranging from two cents to six cents per gallon. With increasing amounts of monies raised by this fuel tax, there developed the principle of dedicated or "earmarked" funds. The adoption of this principle represented a radical departure from the traditional general-fund concept, according to which all tax revenues were placed in a common fund and then appropriated for specific governmental functions.

In Florida, an eight-cent-per-gallon tax is levied on all sales of motor fuels (defined as gasoline or a mixture of gasoline and other products). This tax is divided into four parts:

1. A four-cent-per-gallon "first" gas tax which is distributed into (*a*) the state transportation trust fund; (*b*) a fund equal to 2 percent of the "first" gas tax collected (up to $2.8 million) which is used by the Department of Natural Resources for

eradication of water hyacinths; and (*c*) refunds to service stations, municipalities, agricultural producers, and commercial fishing concerns.

2. A two-cent-per-gallon "second" gas tax which is distributed to the counties to help them meet debt service requirements for road construction.
3. A one-cent-per-gallon "seventh cent" gas tax which is distributed to the counties for construction or maintenance of roads or transportation facilities.
4. A one-cent-per-gallon gas tax distributed to municipalities, after placement in the revenue-sharing trust fund for municipalities for use in construction of transportation facilities.

Furthermore, there is an eight-cent-per-gallon tax on all sales of special fuels. "Special fuels" are defined to signify any liquid product, gas product, or combination thereof used in an internal combustion engine or motor to move any vehicle, machine, or mechanical contrivance or used for the generation of power, heat, light, or energy. They include but are not limited to diesel fuel, kerosine, butane gas, propane gas, and all forms of LPG.[32]

Any county may impose an additional one-cent-per-gallon tax to cover costs of establishing and maintaining a transportation system.

Under Florida Statute § 206.61, no municipality nor other political subdivision may levy any gas tax computed by sale, purchase, storage, distribution, use, consumption, or other disposition of gasoline or like products. However, the First District Court of Appeal has stated that a municipality's ad valorem tangible personal property tax on gasoline was not violative of Florida Statute § 208.44(13),[33] the predecessor of present § 206.61. The court distinguished between excise and ad valorem taxes, stating that the statute prohibited only an excise tax levied by a municipality or political subdivision.

All transporters of motor fuels, *etc.*, must report all deliveries of motor fuels, natural gasoline, or distillates to points within the state, whether the point of origin of a delivery was within or outside Florida. These reports shall be submitted monthly and must list all persons to whom deliveries were made and the number of gallons delivered. In addition, those persons who transport motor fuel over the public highways of the state must have an invoice or other record evidence showing the person from whom they received the fuel, the number of gallons originally received, every person to whom they have delivered, the number of gallons so delivered, and the destination of any undelivered gallons.

SALES TAX

Under Florida Statute § 212.05(6), a tax is imposed at the rate of 4 percent on all charges for electrical power or energy. However, sales of utilities to residential households in Florida by utility companies who pay the gross receipts tax required by § 203 are exempt from the sales and use tax.[34] Sales of fuels to residential households—including oil, kerosine, LPG, and coal, wood, and other fuel products used in the household for the purpose of heating, cooking, lighting, and refrigeration—also are exempt from the tax imposed by § 212.

All fuels used by a public or private utility (including municipal corporations and rural electric cooperative associations) in the generation of electric power or energy for sale, and motor fuels and special fuels on which a tax is imposed by § 206, are exempt from the 4 percent sales, rental, storage, and use tax.[35] All other fuels are taxable except that those utilized by vessels and vehicles licensed as common carriers by the Interstate Commerce Commission or the Civil Aeronautics Board to transport persons or property in interstate or foreign commerce are taxable only to the following extent: a ratio of intrastate mileage divided by interstate mileage traveled by the carrier during the previous fiscal year will be applied each month to the total purchases made in this state to establish that portion of the total which is subject to taxation under Florida Statute § 212.

REGISTRATION TAXES

The Department of Highway Safety and Motor Vehicles is authorized to collect the registration taxes set by law on aircraft[36] and motor vehicles.[37] At present the express purpose of these taxes is to compensate the state for the use of its facilities (highways, *etc.*).[38] However, the Florida Constitution authorizes the levy of such taxes " . . . for the purposes prescribed by law . . . ";[39] thus, within the present constitutional scheme, registration taxes could be designed to reflect a vehicle's degree of energy efficiency.

In addition, all motor carriers regulated by the PSC are subject to a road tax collected by the Department of Banking and Finance.[40] As with the registration tax, this tax is compensatory, and the schedule reflects the relation of road use to amount of taxation. Here is another instance where an energy-efficiency consideration could be developed for use in determining the assessment.

V. PLANNING AND DEVELOPMENT

Preparation and revision of the state comprehensive plan are charged to the Division of State Planning (DSP) in the Department of Administration.[41] Incident to this responsibility, the DSP is charged with coordinating planning among federal, state, and local agencies as well as among Florida and other states. To aid development of the comprehensive plan, each executive department and each of the three state commissions[42] is required to designate a planning officer who will coordinate the planning activities of his respective agency with the DSP.

Regarding areas to be considered in the development of the plan, energy is not explicitly enumerated in the law;[43] however, the list is expressly *not* inclusive, and energy consideration does fit within the general purpose of the plan.[44] But it appears that as there is no independent energy agency and thus no "planning officer," consideration of energy would be only in relation to other areas such as agriculture and transportation.

Footnotes

1. Fla. Stat. § 525.02 (1973).
2. Fla. Stat. § 525.06 (1973).
3. Fla. Stat. § 525.01 (1973).
4. Fla. Stat. § 526.01 (1973).
5. Fla. Stat. § 340.12 (1973).
6. Fla. Stat. § 330.45 (1973).
7. Fla. Stat. § 360.12 (1973).
8. Fla. Stat. § 350.12 (1973).
9. Fla. Stat. § 323.02 (1973).
10. Fla. Stat. § 323.03 (1973).
11. Fla. Stat. § 323.05 (1973).
12. Fla. Stat. § 323.05(3) (1973).
13. Fla. Stat. § 125.01(n) (1973).
14. Fla. Stat. § 527.02 (1973).
15. Fla. Stat. § 469.01 (1973).
16. Fla. Stat. § 553.05 (1973).
17. *Id.*
18. Fla. Stat. § 533.05 (1973).
19. Fla. Stat. § 163.295 (1973).
20. Fla. Stat. § 468.182 (1973).
21. Fla. Stat. § 553.15 (1973).
22. Fla. Stat. § 163.295 (1973).
23. Fla. Stat. §§ 553.70-.85 (Supp. 1974).
24. Fla. Stat. § 320.26 (1973).
25. Fla. Stat. § 330.07 (1973).
26. Fla. Stat. § 166.231 (Supp. 1974).
27. State *ex rel.* Volusia County v. Dickinson, 269 So. 2d 9 (Fla. 1972).
28. Fla. Const. art. VII, § 9(a) (1968).
29. Fla. Stat. § 203.01 (1973).
30. Fla. Laws 1955, ch. 31166; Fla. Laws, Special Acts of 1953, ch. 29334; Fla. Laws, Special Acts of 1955, SB50.
31. Fla. Const. art. XII, § 9(a) (1968).
32. Except those forms taxable under Fla. Stat. pt. 1, § 206.01 *et seq.* (1973).
33. Hi-Octane Terminal Co. v. Panama City, 164 So. 2D 39 (Fla. 1964).
34. Fla. Stat. § 212.08(7) (1973).
35. Fla. Stat. § 212.08(4) (1973).
36. Fla. Stat. § 330.09 (1973).
37. Fla. Stat. § 320.011 (1973).
38. Fla. Stat. § 320.26 (1973).
39. Art. VII, § 1(b) (1968).
40. Fla. Stat.

40. Fla. Stat. § 323.15 (1973).
41. Fla. Stat. § 23.012 (1973).
42. Public Service Commission, Game and Fresh Water Fish Commission, Parole and Probation Commission.
43. Fla. Stat. § 30.012 (1973).
44. Fla. Stat. § 30.0114 (1973).

Chapter Six

RECENT DIRECT RESPONSE TO ENERGY PROBLEMS

I. INTRODUCTION

Historically, the state's role in direct energy policy formulation has been virtually nonexistent. Within the last two years, however, the Legislature has passed several acts which set into motion the machinery to address this limited governmental response.

II. CREATION OF FEC

The first of these laws created the Florida Energy Committee (FEC).[1] Comprising the Committee's membership are eight legislators—four appointed by the leadership of each house—and seven citizens appointed by the Governor from the educational, industrial, environmental, and public sectors. The Committee represents a joint effort by the Legislature and the Administration to gain a clearer perspective on the nature of energy in Florida through extensive, longe-range research and analysis.

Upon its creation in 1973, the Committee was charged with the following responsibilities:

- To study in detail the present policies affecting energy conservation and use in Florida.
- To study the sources of energy available for use in Florida as well as the interrelationships between population expansion and increased energy demand.
- To recommend a comprehensive system of energy policies to meet the needs of the state.
- To recommend administrative, statutory, and constitutional changes deemed necessary to improve or implement Florida's energy policies.

The Committee was directed to convey its findings (including proposed legislation to implement the recommendations) to the Legislature and the Governor in annual reports issued no later than thirty days prior to each regular meeting of the Legislature through the 1976 session. The first such report was distributed in March 1974, and its proposals produced several laws relating to energy research and development.

III. ENERGY DATA CENTER

The Energy Data Center was created and placed within the Department of Administration's Division of State Planning as a means to provide more continuous mechanisms for the gathering of information necessary to enable the state to deal effectively with energy problems.[2] The Center is charged with the responsibility to collect data on the extraction, production, importation, exportation, refinement, transportation, transmission, conversion, storage, sale, and reserves of energy resources within Florida. This information—in the prescribed form of reports to the Center's director—is derived from persons engaged in the activities enumerated above. Each report contains a summary of the type, quantity, and current status of the energy resource involved and identifies the individual submitting it.

The Center itself will prepare periodic reports of the energy data collected and will utilize to the fullest extent possible any existing information prepared for state and federal agencies. A system which permits reasonable access to information developed is being established. The data collected by the Center is available to the public, except that a person submitting information may request it remain confidential. Under no circumstances shall data reported by entities other than the Data Center be classified as confidential by the Center; confidentiality of information is protected with criminal sanctions available where applicable. It is the intent of the Act that information so developed be utilized in the formulation of short- and long-term state energy policy.

IV. SOLAR ENERGY CENTER

The studies and research conducted by the Committee prompted legislative recognition of the potential of solar energy as a renewable energy resource for Floridians. The Board of Regents of the State University System, pursuant to legislative mandate, has developed a plan for the establishment of a solar energy center in Florida, which was submitted to the Legislature on March 1, 1975.[3] Cape Canaveral has been selected as the site. The solar energy center which will be established according to this plan is designed to advance research and development in solar energy, to disseminate information on the results of the research, and to engage in projects designed to exemplify the capability of solar energy as a resource for meeting state energy needs. The center will provide the capability for a continuing research effort in the area of solar energy.

One task the center may perform is the dissemination of information on solar technology to the public. The Florida Energy Committee has contracted with the Environmental Information Center of the Florida Conservation Foundation to provide information on building solar energy collecting devices for residential use. Results of the Center's research should be available for public distribution by June 1975.

V. ENERGY LIFE-CYCLE COST ANALYSIS

Studies undertaken and reports submitted to the legislature pursuant to the FEC's enabling legislation indicated that energy-efficient designs utilized in the construction of buildings provide energy savings over the life of a building resulting in the significant reduction of operation and maintenance costs. The Department of General Services, Division of Building Construction, was subsequently directed to promulgate rules and procedures for conducting life-cycle costs analysis and developing energy performance indices to be utilized in evaluating competing designs for construction of state-financed buildings and leased facilities.[4] As of July 1, 1974, no state agency may lease, construct, or have constructed a facility without first securing from the Division a proper estimation of life-cycle costs involved if the facility to be leased encompasses an area of 5,000 square feet or greater, or if such facility to be constructed encompasses an area of 20,000 square feet or more. Under this Act, life-cycle costs constitute a primary consideration in the selection of all future building designs and facilities to be leased by state agencies. The law directs that the rules promulgated pursuant to its mandate shall be based upon the best currently available methods of analysis and shall be re-evaluated in light thereof on an annual basis. The Act, therefore, represents a commitment by the state to incorporate into its rules any improvements in methods of analysis and thereby insure that the latest and best techniques are considered in the selection of building designs.

VI. OFFICE OF PETROLEUM ALLOCATION AND CONSERVATION

The state's role in petroleum allocation and conservation has been assumed by the Department of Administration.[5] The Department was awarded the responsibility of implementing any federal program delegated to the state relating to petroleum supply, demand, or allocation. In addition, the agency was directed to develop, in conjunction with the Florida Energy Committee, a fair and equitable petroleum plan. By legislative mandate, it must develop short-term forecasting capability and in cooperation with the Committee, the Department of Revenue, and other relevant state agencies, provide for long-range studies regarding energy usage in Florida to enable it to develop the requisite energy expertise to meet its responsibilities under the law. The Department may also require periodic reports of petroleum use, sales (except retail sales at the pump), inventories, expected supplies and allocations, and petroleum conservation measures from public and private sources. All state agencies must provide the Department with timely petroleum use information in order that the accuracy of collected data may be determined. No proprietary information gathered under this Act may be divulged nor made known by any state employee except as provided in the Act; any person violating this law is subject to criminal sanctions.

Footnotes

1. Fla. Laws 1973, ch. 73-130, *as amended*, Fla. Laws 1974, ch. 74-188.
2. Fla. Stat. § § 377.601-.608 (Supp. 1974).
3. Fla. Laws 1974, ch. 74-185.
4. Fla. Stat. § § 255.251-.256 (Supp. 1974).
5. Fla. Stat. § 377.701 (Supp. 1974).

CONCLUSION

The scheme of Florida law as it relates to energy is a result of the interaction of statutes and regulations whose primary purpose is to implement non-energy policies. Thus, in each of the functional areas studied, the "law" governing energy or energy-related activities is actually conditioned upon policies concerning preservation of natural resources, regulation of business, protection of the consumer, protection of the environment, or generation of revenue. While these considerations are important, formulation of an independent energy policy is essential: such a change would transform energy impact into a causative rather than a resultant factor in state policy decision making.

343.75907
F636e
c. 2

UNIVERSITY OF FLORIDA
3 1262 04488737 9